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BEFORE THE

DEPARTMENT OF TRANSPORTATION

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DOCKETS

WASHINGTON, D.C.

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Joint Application of

CONTINENTAL AIRLINES, INC.

and

COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A.

Docket OST-00-8577 - 8

under 49 U.S.C. §§ 41308 and 41309 for approval
of, and antitrust immunity for, an alliance agreement

JOINT MOTION OF
CONTINENTAL AIRLINES, INC. AND
COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A.
FOR CONFIDENTIAL TREATMENT

Communications with respect to this document should be sent to:

Moises Veliz
Vice President, Government Affairs
COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A.
Ave. Justo Arosemena y Calle 39
Panamá 1, Panamá.

Rebecca G. Cox
Vice President, Government Affairs
CONTINENTAL AIRLINES, INC.
1350 I Street, N.W.
Washington, D.C. 20005

Charles A. Hunnicutt
G. Brent Connor
ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.
1801 K Street, N.W.
Suite 1200
Washington, DC 20006-1301
(202) 775-0725

Hershel I. Kamen
Staff Vice President,
International & Regulatory Affairs
CONTINENTAL AIRLINES, INC.
P.O. Box 4607 - HQSGV
Houston, TX 77210-4607

and

Counsel for
Compañía Panameña de Aviación, S.A.

R. Bruce Keiner, Jr.
Thomas Newton Bolling
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Counsel for
Continental Airlines, Inc.

February 9, 2001

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of :
CONTINENTAL AIRLINES, INC. :
and : Docket OST-00-8577
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Pursuant to Rule 12 of the Department's Rules of Practice, Continental¹ and COPA move the Department to withhold from public disclosure confidential information contained in the complete copy of the Continental/COPA Alliance Agreement submitted under seal with this motion.² This document is submitted to

¹ Common names are used for airlines.

² Continental and COPA seek confidential treatment only for portions of the complete copy of the Continental/COPA Alliance Agreement that disclose information not included in the redacted copy of the Alliance Agreement submitted to the Department and made public on June 12, 1998. (See Joint Application of Continental and COPA for Statements of Authorization to Engage in Reciprocal Code-Share Operations, Undocketed, June 12, 1998) Redactions in that document were portions of Article B (3), Article C and Article D. The complete Continental/COPA Alliance Agreement includes previously redacted material, except for the Code-Share Commission percentage (see Article B 3 (a)) and Frequent Flyer Program settlement charges (see Article C 1 (c)), which are not relevant and thus are not required by the Department. (See, e.g., Orders 95-11-5 and 97-5-4 and the Department's Notice dated February 12, 1998, in Docket OST-97-3285)

the Department to satisfy the requirements of Order 2001-2-5 and support the joint application of Continental and COPA for approval of, and antitrust immunity for, their alliance agreement.³ In accordance with Rule 12 of the Department's Rules of Practice, Continental and COPA are submitting copies of this document to the Department separately in a sealed envelope bearing the above-referenced caption and marked "Confidential Treatment Requested Under § 302.12." The scope of this request for confidential treatment is limited to information in this document that did not appear in the redacted copy of the Continental/COPA Alliance Agreement submitted to the Department and made public on June 12, 1998.

Continental and COPA state as follows in support of their motion:

1. Continental and COPA are seeking confidential treatment under Rule 12 for the confidential information in the complete copy of the Continental/COPA Alliance Agreement because the information is commercially sensitive and confidential. The Freedom of Information Act ("FOIA") Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (5 U.S.C. § 552(b)(4)) Courts have interpreted this FOIA statutory exemption to prevent public disclosure of

³ Notwithstanding this request for confidential treatment, Continental and COPA understand the Department has granted interim access to counsel and outside experts for interested parties who have submitted appropriate affidavits with the Department in advance (Order 2001-2-5 at 2), and Continental and COPA have no objection to such access.

information that is not usually released to the public and which, if released, would cause substantial harm to the competitive position of the person from whom the information was obtained. (See, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 871 (2d Cir. 1978); and National Parks & Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir 1976)) The Department has consistently followed this interpretation of FOIA Exemption 4. (See, e.g., Orders 2000-5-18 and 99-9-9) The purpose of this statutory exemption "is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens' ability to confide in their government." (Burke Energy Corp. v. Department of Energy, 583 F.Supp. 507, 510 (D. Kansas 1984))

2. To qualify for this exemption, information must be: (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. (See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)) The confidential document submitted by Continental and COPA with this motion satisfy this three-part test.

First, the information is commercial or financial in nature. The document discloses commercial and financial information in connection with the Continental/COPA alliance that is confidential and was not disclosed in the redacted copy of the Continental/COPA Alliance Agreement previously made public.

Moreover, this confidential information is proprietary, commercially sensitive and of a commercial and financial nature and would not otherwise be made public.

Continental and COPA are providing this confidential information in the complete copy of the Continental/COPA Alliance Agreement to the Department only to satisfy the requirements of Order 2001-2-5 and enable the Department fully and expeditiously to evaluate the Continental/COPA request for antitrust immunity for their alliance agreement.

Second, the information submitted under seal has been "obtained from a person" within the meaning of Exemption 4. Continental and COPA are each a "person" as defined by 5 U.S.C. § 551(2).

Third, the information is "confidential." This confidential information is not generally available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the court held that information is "confidential" for purposes of Exemption 4 if it would not customarily be released to the public by the person from whom it was obtained and if disclosure is likely to have either of the following results: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (498 F.2d at 770) The Department has found in similar antitrust-immunity cases that the confidential information submitted to the Department should be accorded

confidential treatment. (See, e.g., Orders 2000-5-18 and 99-9-9) In doing so, the Department has said that granting confidential treatment to information contained in documents such as the one being submitted by Continental and COPA is justified since they are "private documents which would not otherwise be made available to the public." (See, e.g., Order 89-11-8 at 9, made final by Order 89-11-26 at 1) Moreover, public disclosure of the confidential information covered by this motion would cause substantial harm to the competitive position of Continental and COPA and could impair the Department's ability to obtain similar information on a voluntary basis from other persons in the future.

WHEREFORE, Continental and COPA ask the Department to grant their joint motion for confidential treatment of the information in the complete copy of the Continental/COPA Alliance Agreement submitted with this motion that was not disclosed to the public in the redacted copy of the Continental/COPA Alliance Agreement.

Respectfully submitted,

ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.



Charles A. Hunnicutt
cahunnicutt@rkmc.com

CROWELL & MORING LLP



R. Bruce Keiner, Jr.
rbkeiner@cromor.com



G. Brent Connor
gbconnor@rkmc.com

Counsel for
Compañía Panameña de Aviación, S.A.



Thomas Newton Bolling
tbolling@cromor.com

Counsel for
Continental Airlines, Inc.

February 9, 2001

INDEX OF CONFIDENTIAL DOCUMENT

Continental/COPA Alliance Agreement dated May 22, 1998
29 pages (complete)

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on all persons served with the joint application of Continental and COPA in accordance with the Department's Rules of Practice.



Thomas Newton Bolling

February 9, 2001

SERVICE LIST

Raymond J. Rasenberger
Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W.
Suite 600
Washington, DC 20006-3939
rjrasenberger@zsrlaw.com
(for Houston)

Hoyt Brown
Deputy Director
Department of Aviation
City of Houston
16930 John F. Kennedy Blvd.
Houston, TX 77032

Bradley Rubinstein
Manager, Air Service Development
& External Affairs
Port Authority of New York
& New Jersey
One World Trade Center, 65N
New York, NY 10048

U.S. Transcom/TCJ5-AA
Attention: Air Mobility Analysis
508 Scott Drive
Scott AFB, IL 62225-5357

L. Nicholas Lacey
Director
Office of Flight Standards
Federal Aviation Administration
800 Independence Avenue, S.W.
Room 300-W
Washington, DC 20591

Roger W. Fones
Chief, Transportation, Energy
& Agriculture Section
Antitrust Division
Department of Justice
325 Seventh Street, N.W.
Suite 500
Washington, D.C. 20530
roger.fones@usdoj.gov

Robert P. Silverberg
Silverberg, Goldman & Bikoff, L.L.P.
1101 30th Street, N.W.
Suite 120
Washington, DC 20007
rsilverberg@sbgdc.com
(for ABX Air and Aerial Transit)

Joanne W. Young
Baker & Hostetler LLP
Washington Square
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036-5304
jyoung@bakerlaw.com
(for America West)

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, DC 20036
carl.nelson@aa.com

Marshall S. Sinick
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC 20004
msinick@ssd.com
(for Alaska Airlines
and Florida West)

John L. Richardson
Crispin & Brenner, P.L.L.C.
1156 15th Street, N.W.
Suite 1105
Washington, DC 20005
jrichardson@crispinandbrenner.com
(for Amerijet)

Allan W. Markham
Allan W. Markham, PC
2733 Thirty-Sixth Street, N.W.
Washington, DC 20007
awmpc@aol.com
(for Arrow)

Aaron A. Goerlich
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036-2605
agoerlich@bgairlaw.com
(for Carnival)

William H. Callaway, Jr.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939
whcallaway@zsrllaw.com
(for Challenge)

Robert E. Cohn
Shaw Pittman
2300 N Street, N.W.
5th Floor
Washington, DC 20037
robert_cohn@shawpittman.com
(for Delta)

Stephen H. Lachter
1150 Connecticut Avenue, N.W.
Suite 900
Washington, DC 20036
lachter@erols.com
(for DHL)

Richard P. Taylor
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
10th Floor
Washington, DC 20036
rtaylor@steptoe.com
(for Evergreen)

Kent Scott
President & Chief Operating Officer
Emery Worldwide Airlines, Inc.
One Emery Plaza
Dayton International Airport
Vandalia, OH 45377
scott.kent@emeryworld.com

Nathaniel P. Breed, Jr.
Shaw Pittman
2300 N Street, N.W.
5th Floor
Washington, DC 20037
nathaniel_breed@shawpittman.com
(for Federal Express)

Pierre Murphy
Law Offices of Pierre Murphy
One Westin Center
2445 M Street, N.W.
Suite 260
Washington, DC 20037
pmurphy@lopmurphy.com
(for Fine)

Jeffrey N. Shane
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
jnshane@hhlaw.com
(for Fine)

Megan Rae Rosia
Managing Director, Government
Affairs and Associate General
Counsel
Northwest Airlines, Inc.
901 Fifteenth Street, N.W.
Suite 310
Washington, DC 20005
megan.rosia@nwa.com

Jeffrey A. Manley
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420
jmanley@wilmer.com
(for Polar and United)

Jeffrey Crippen
President
Ryan International Airlines, Inc.
266 North Main
Wichita, KS 67202
Jcrippen@attglobal.net

John R. Brimsek
Mullenholz, Brimsek & Belair
1150 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20036
jrb@mbblawyers.com
(for TACA)

Glenn P. Wicks
The Wicks Group, Inc.
1700 North Moore Street
Suite 1650
Arlington, VA 22209
gpwicks@aol.com
(for TWA)

David L. Vaughan
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
dvaughan@kelleydrye.com
(for UPS)

Donald T. Bliss
O'Melveny & Myers LLP
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004-1109
dbliss@omm.com
(for US Airways)

Malcolm Bengé
Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W.
Suite 600
Washington, DC 20006-3939
mlbenge@zsrlaw.com
(for World Airways)

Julie Sande
Manager, Contract & Regulatory
Affairs
World Airways, Inc.
13873 Park Center Road
Suite 490
Herndon, VA 22071
sande@woa.com